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Supreme Court of the United States

October Term, 1971.

No. 71-5509.

EDWARD A. BURT,
Petitioner,

v.

STATE OF NEW JERSEY,
Respondent.

On Petition for Writ of Certiorari.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

ANTHONY M. BEZICH,
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Court House, Camden New Jersey 08101
A. DONALD BIGLEY,
Prosecutor of Camden County,
CHARLES A. COHEN,
Assistant Prosecutor,
On the Brief.

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STATEMENT OF THE CASE.

The defendant, Edward A. Burt, now petitioner for a writ of certiorari, was indicted by a grant jury of the County of Camden, State of New Jersey, for the murder of one Owens. The defendant entered a plea of not guilty, and the case was tried before a judge and jury, with the result of a verdict of guilty of murder in the second degree, and a sentence imposed that the defendant be imprisoned in the New Jersey State Prison for a term of 25 to 30 years.

The defendant appealed from the judgment of conviction to the Superior Court of New Jersey, Appellate Division, and that court on November 14, 1969, affirmed the judgment of conviction. *State v. Burt,* 107 N. J. Super. 390 (App. Div. 1969). The decision of the Appellate Division having been by a unanimous court, and the defendant perhaps overlooking or not considering that a substantial constitutional question was involved, could not or did not appeal directly to the Supreme Court of New Jersey, but petitioned for certification (equivalent to a writ of certiorari), and the Supreme Court granted certification, 55 N. J. 588, and later, on July 27, 1971, affirmed the conviction for the reasons expressed in the Appellate Division opinion. *State v. Burt,* 59 N. J. 156 (1971). Mr. Justice Hall, of the Supreme Court of the State, filed an opinion, concurring in part and dissenting in part. The dissent related only to the sentence, and was thought by Justice Hall to be too severe. Justice Hall dwelt at length with the proposition now advanced by the defendant in his present petition for a writ of certiorari, and the conclusion he reached agreed with that of the majority of the court.

At the trial, the defendant (now petitioner) took the witness stand, and testified in his own defense. He claimed that the shooting was accidental, as described on page 4 of the petition for writ of certiorari. On cross-examination the prosecutor asked the defendant certain questions and the defendant gave certain answers, as follows:

Q. Did you ever tell this story to the police?

A. No, sir.

Q. You are telling us now this shooting was accidental, is that correct?

A. It was accidental, sir.

Q. But you never told the police that?

A. No, sir (T741).

What followed is correctly set forth in pages 5, 6 and 7 of the petition for writ of certiorari, and need not be repeated here.

The State opposes the petition for a writ of certiorari.

ARGUMENT.

I.

The State Supreme Court correctly decided the issue presented, and certiorari should be denied.

(a)

No one has disputed the legal right of the petitioner while he was a suspect in police custody to refrain from giving an account of the fatal occurrence, and if the petitioner had not taken the witness stand and testified in his own defense, nothing of his taciturnity while in custody would have entered the trial. But the petitioner *did* take the stand and *did* testify, and tendered to the jury for their acceptance an account which, if believed, would have exculpated him from the charge of murder in any degree. Must the account be resignedly accepted by the State, and must the State be denied the right to penetrate beneath the superficial, and forbidden to inquire into the plausibility or believability of the testimony, simply because it comes from the defendant himself in a criminal case and not from a witness not also a party? The answer must in common sense obviously be in the negative, and so also in the law.

In *Raffel v. United States*, 271 U. S. 494, 496, 46 S. Ct. 566, 70 L. Ed. 1154 (1925), the court said: "The immunity from giving testimony is one which the defendant may waive by offering himself as a witness. * * * When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. * * * He may be examined for the purpose of impeaching his credibility. * * * His failure to deny or explain evidence of incriminating circumstances of which he may have knowledge, may be the basis of adverse inference, and the jury may be so instructed. * * * His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." (Citations omitted.)

But then it is now claimed that the State's right of cross-examination of the defendant as a witness is imperfect, and may not enter the domain reserved to him by the Fifth Amendment. Specifically, in this case the petitioner contends that the State may not pursue its valid objective by inquiring of the petitioner whether when he was taken in custody by the police, or afterwards, he gave them the account which he now, at the trial, relates, that the shooting was accidental.

Certainly the question put was relevant as a test of credibility of the petitioner and of his testimony on direct examination, and certainly it possessed intrinsic power of discovery in that regard, for if it was true that the gun was fired or had gone off accidentally, then it would be most extraordinary and against the instinct for self-preservation for the suspect to fail to cry out to the police when taken in custody or later, and to all others who might approach him, that the injury was unintended and an accident.

(b)

The relevant portion of the Fifth Amendment consists of these words, "No person * * * shall be compelled in any criminal case to be a witness against himself." No one compelled the defendant to take the witness stand. He ascended the witness stand voluntarily. The questions asked him on cross-examination were manifestly intended to test the credibility of the petitioner with respect to the version of the homicide given by him in evidence, and no more.

In *Snyder v. Commonwealth of Massachusetts*, 291 U. S. 97, 122, 54 S. Ct. 330, 338, 78 L. Ed. 674, 687 (1934), Justice Cordozo sagely, and with gentle reproof, warned that "justice though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament." Attention of a positive law, that the accused in a criminal case shall not be compelled to be a witness against himself, should not by inordinate extension and refinement produce the result that where the accused asks to be heard from the witness stand his credibility may not be impeached on cross-examination by inquiry whether the story he now tells was given by him earlier to the police, where the circumstances are such that it would be a cause for incredulity not to have given the story then, were it true.

The right to remain silent (as the interdiction of the use of compulsion is often translated) was at no time challenged in the case at hand. The defendant had a perfect right to keep to himself the fact of accidental homicide. The revelation under cross-examination that he had not offered the explanation to the police did not touch upon the right to be silent, but only on the departure from normal behavior. Normally a person in the petitioner's situation would have spoken up at the first opportunity, not because of compulsion from outside forces, but because of the compelling inner force for self-preservation.

The case of *Grunewald v. United States*, 353 U. S. 391, 77 S. Ct. 963, 1 L. Ed. 2d 931 (1957), differs essentially from the case at hand. There, the defendant had refused to answer certain questions put to him before the grand jury, asserting there his privilege under the Fifth Amendment, but at the trial he answered the same questions, on direct examination, in a manner favorable to his interest, and on cross-examination the Government was permitted, over objection, to draw from him the admission that he had refused to answer the questions before the grand jury on the ground that his answers might tend to incriminate him. Held, reversible error; that under the particular circumstances of the case the earlier resort to constitutional privilege could not be used to discredit the defendant.

In the case at bar, there was no corresponding episode of advantage earlier taken to avoid answering embarrassing questions, and no intimation of the kind was made. If in answer to the question asked the present petitioner he had said yes, he told the police the version of accidental shooting, then obviously he would have scored a heavy point in his own favor. But he answered no, he had not told the police that the shooting was accidental, and this answer in the nature of the circumstances the jury could well find impaired his credibility. This result was the single purpose of the prosecutor's question and of his summation, not because defendant had sought refuge in the Fifth Amendment or in silence, but because the defendant, contrary to the usual course of human nature and human behavior, had not on his own volition earlier proclaimed the fact of accident, if true fact it was.

Nothing in the present case justifies a supposition that the petitioner did not give the story of accidental shooting to the police because he declined to discuss the occurrence at all or because he claimed the protection of the Fifth Amendment. In *Miranda v. State of Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the court said:

> "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege (to remain silent) when he is under police custodial investigation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."

But, in the case at bar, the prosecution did not use at the trial the fact that the petitioner stood mute or claimed his privilege; quite differently, the cross-examination inquired only whether the petitioner had told the police the story of accidental shooting, and this inquiry was prompted by the account the petitioner had just given on direct examination, and the purpose and utility of the inquiry was, not to supply evidence of guilt, but only to affect the credibility of the petitioner and his version of the occurrence. At no time did the State, anticipatorily or in rebuttal, introduce evidence that the petitioner had never offered to the police the account of the occurrence he gave at the trial.

(c)

We consider *Harris v. New York*, 401 U. S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 694, decided February 24, 1971, dispositive of the present case, for there the court concluded that the "petitioner's credibility was appropriately impeached by use of his earlier conflicting statements," even though the earlier statements had been obtained by the police without first giving the defendant all the requisite *Miranda* warnings. The case at hand is much stronger than *Harris v. New York*, for here no prior statements made by the petitioner were referred to at all, and no conflict between pretrial and trial statements was used to discredit the petitioner. The conflict here is between the account given by the petitioner at the trial and his failure to give the exculpating account to the police while in custody. The conflict is between his actual behavior and the behavior all others

would have pursued had the truth been as the petitioner related at the trial.

(d)

On page 11 of the petition for writ of certiorari the following prophecy is made:

> "If a defendant's credibility can be attacked by reference to his prior silence while in police custody, the protection afforded by the Fifth Amendment would be reduced to a nullity. No accused could invoke his right to remain silent without fear that its assertion would be used adversely against him at trial. If an accused withstood this chilling effect and did assert his right not to incriminate himself, he would then place himself in the unenviable position of having to subsequently defend his actions at trial against an attack on his credibility which has no basis in logic or law. Finally, to condone cross-examination questioning and summation comments on an accused's silence while in police custody would be virtually to emasculate the safeguards afforded by Miranda."

The petitioner greatly overstates the desolation a decision contrary to his advocacy would create. Significantly, he does not seem to forsee that the cause of Truth would suffer.

The protection afforded by the Fifth Amendment would not be reduced to a nullity by failure to adopt the petitioner's view of his case, for the decision would apply only to circumstances where the defendant has taken the stand and testified in his own behalf, and where the scrutinized cross-examination touches upon testimony given by the defendant on his direct examination and its manifest purpose is to probe into credibility and not to supply substantive proof in aid of the prosecution.

And the petitioner looks with dismay upon the unenviable position he would be in at the trial to withstand an attack

upon credibility if he exercised his right to remain silent before trial but desired to testify at the trial. The position of no witness is enviable, for all the subject to impeachment of credibility, and no good reason to make an exception in favor of a defendant, *pro tem* a witness, has been offered.

And the last sentence in the quoted passage from the petition far too broadly states the issue in the instant case. The prosecution did not comment on the petitioner's silence while in police custody. So far as the present record discloses, the petitioner may have been the most voluble of men. We are concerned here only with one particular, namely, his remarkable failure to tell the police that the shooting was accidental if in truth it was. Nothing in the record permits an inference that the failure to speak up was due to a defensive attitude of silence or a claim of Fifth Amendment privilege. The question by the prosecutor or his remarks on summation did not refer to such attitude or claim of privilege, but only to one particular fact, revealed by the petitioner himself on his direct examination as a witness on his own behalf, namely, the supposed fact of accidental shooting.

II.

A Writ of Certiorari should not be allowed in the case now before the court simply to review a decision in another case between other parties.

The petitioner would have the court grant a writ of certiorari in the instant case of Edward A. Burt v. State of New Jersey in order to provide a vehicle to overrule the determination in *Raffel v. United States*, 271 U. S. 494, 46 S. Ct. 566, 70 L. Ed 1054 (1925). In no event should a judgment in one case be subjected to review to afford an opportunity to deal a mortal blow at a decision involving other and unrelated parties. Whether a writ should be granted here

must be decided on its own facts, and not to create an opportunity to enter upon an academic exploration of a decision rendered between other parties and upon different facts.

III.

Assuming that the decision of the Supreme Court of the State of New Jersey is in conflict with decisions of the courts of appeal (a fact not conceded), it in itself does not warrant the issuance of a writ of certiorari.

IV.

It is not ground for the issuance of a Writ of Certiorari in the instant case that the decision of the Supreme Court of the State of New Jersey is in conflict with the decision of the Supreme Court of Ohio in another case.

The Ohio case to which the petitioner refers is *State v. Stephens*, 24 Ohio St. 2d 76, 263 N. E. 2d 773 (Supreme Court, 1970), a case which has significant dissimilarities. Moreover, Schneider, J., in a concurring opinion, said:

> "I do not quarrel with the rule of Griffin that a defendant in a criminal cause who chooses to exercise his right not to testify in his own behalf is protected against unfavorable comment to the jury on the exercise of his privilege. But it does not follow, when an accused offers himself as a witness under oath in his own behalf, thereby placing his credibility in issue, that the Constitution prevents his credibility being tested by evidence of past behavior connected with the offense for which he was on trial, as well as by evidence of prior adjudications of his transgressions against the law."

CONCLUSION

The petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated, November 16, 1971.